92-1994

No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION,
JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONER

June 15, 1993

35 pp

QUESTIONS PRESENTED FOR REVIEW

Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception to the final judgment rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law.

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GEANA J. DUNKIN,
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LOUISIANA-PACIFIC CORPORATION,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Geana J. Dunkin and David L. Smith hereby request this Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Tenth Circuit entered in this case on February 11, 1993.

OPINIONS BELOW

The orders entered by the United States Court of Appeals for the Tenth Circuit on February 11, 1993 and March 17, 1993 are included in the Appendix at 1a and 215a, respectively.

The order, the order protecting confidential information, and the special order of reference to United States magistrate judge--all entered by the United States District Court for the District of Colorado on July 16, 1992--are included in the Appendix at 121a, 126a, and 131a, respectively. The reporter's transcripts of the hearings in the United States District Court for the District of Colorado on July 9, 1992, July 16, 1992, December 3, 1992, and December 10, 1992 are included in the Appendix at 5a, 12a, 137a and 184a, respectively.

JURISDICTION

The date of the entry of the order sought to be reviewed is February 11, 1993.

The date of the entry of the order respecting a rehearing is March 17, 1993.

Jurisdiction of this Court to review the order in question by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291

28 U.S.C. § 1927

Fed. R. App. P. 38

10th Cir. R. 46.5

STATEMENT OF THE CASE

This case was filed in the United States District Court for the District of Colorado on February 7, 1992, United States District Judge Edward W. Nottingham presiding. In her complaint, plaintiff Geana J. Dunkin stated claims for relief pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991; the Colorado Antidiscrimination Act of 1957, C.R.S. §§ 24-34-301 et seq.; and Colorado common law.

On July 9, 1992, Judge Nottingham held a hearing and announced his order granting the motions for protective orders filed by defendants Louisiana-Pacific Corporation, James Beldin, and Douglas Eddins;[1] imposing sanctions (including harsh verbal reprimands) against

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[1]Judge Nottingham granted defendants' motions for protective orders even though the defendants failed to show "good cause" for a protective order under Fed. R. Civ. P. 26(c). See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Specifically, the

Ms. Dunkin and/or her attorney, David L. Smith (a sole practitioner in Denver, Colorado), for refusing to sign the confidentiality agreement proposed by the defendants with respect to the documents to be produced to Ms. Dunkin in the case;[2] and requiring Ms. Dunkin to obtain approval of her depositions and other discovery requests from a United States magistrate judge as a condition precedent to conducting any discovery in the case.[3] In connection with the sanctions imposed against Ms. Dunkin and her attorney, Judge Nottingham ordered the defendants to file their applications for attorney fees by July 13, 1992, and set a hearing for July 16, 1992, at 6 a.m., to resolve any disputed matters relating to the applications.

On July 16, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees and announced his orders

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defendants failed to show that the documents and information sought to be protected were subject to any confidential information privilege.

[2]The confidentiality agreement proposed by the defendants was exceedingly broad in scope, covering virtually every document to be produced to Ms. Dunkin in the case, as well as all information obtained from such documents, and requiring the plaintiff to follow burdensome and expensive procedures for use of the documents and information at depositions and at trial.

[3]Under the stipulated scheduling and discovery order signed by the attorneys for the parties and by Judge Nottingham, and entered by Judge Nottingham on May 28, 1992, discovery, including the depositions of the parties and more than 38 witnesses, was to be completed by September 25, 1992.

awarding attorney fees of $4,060.00 against Ms. Dunkin's attorney; requiring Ms. Dunkin's attorney to pay this amount to the defendants on or before July 27, 1992; and denying Ms. Dunkin's attorney's request for a stay of execution on the award of attorney fees pending appeal. Judge Nottingham then issued a written order awarding "an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time)," as well as a written order "protecting confidential information" and a written special order of reference to United States magistrate judge imposing additional burdensome and illegal conditions on Ms. Dunkin's discovery in the case. Throughout Judge Nottingham's verbal and written orders, Ms. Dunkin's attorney was attacked, reprimanded and vilified in the harshest conceivable terms.

On July 27, 1992, Ms. Dunkin and her attorney filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit with respect to Judge Nottingham's July 16, 1992 orders.

On July 28, 1992, the defendants filed with the district court their motions to dismiss Ms. Dunkin's civil rights case with prejudice or, alternatively, to condition production of documents upon payment of attorney fees, and to show cause why Ms. Dunkin's attorney should not be held in contempt of court. The basis for these motions was Ms.

Dunkin's attorney's refusal to obey Judge Nottingham's July 16, 1992 order to pay $4,541.25 in attorney fees to the defendants on or before July 27, 1992.

On August 10, 1992, the court of appeals ordered the parties simultaneously to serve and file memorandum briefs in support of their respective positions on the following jurisdictional issue:

> Whether the order being appealed is appealable at this time? See: G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990).

On August 28, 1992, the defendants filed with the court of appeals their motion requesting sanctions to be imposed against Ms. Dunkin and her attorney for filing a frivolous appeal. The defendants also filed their memorandum brief in support of their position on the jurisdictional issue identified by the court of appeals, and in support of their motion for sanctions.

On August 31, 1992, Ms. Dunkin and her attorney filed with the court of appeals their memorandum brief in support of their position on the jurisdictional issue identified by the court of appeals, and their suggestion for hearing en banc.

On November 2, 1992, Ms. Dunkin and her attorney filed with the court of appeals their response to defendants' August 28, 1992 motion for sanctions.

On December 3, 1992, Judge Nottingham held a hearing and announced his order denying Ms. Dunkin's motion for reconsideration of the order announced by United States Magistrate Judge Bruce D. Pringle on October 29, 1992 at the deposition of defendant Douglas Eddins, and imposing sanctions against Ms. Dunkin and her attorney pursuant to Local Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado and/or Fed. R. Civ. P. 37. In his October 29, 1992 order, Magistrate Judge Pringle held that discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation who worked at the "stacker building" near the Walden, Colorado sawmill was not relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b), and sustained the objection of defendants' attorney to related deposition questions asked by Ms. Dunkin's attorney. At the December 3, 1992 hearing on the motion for reconsideration of Magistrate Judge Pringle's October 29, 1992 order, Judge Nottingham conceded that discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation was relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b), but concluded that Magistrate Judge Pringle's October 29, 1992 order was not "clearly erroneous" or "contrary to law" under Local Rule 602C, which carries a mandatory assessment of attorney fees

against the losing party on a motion for reconsideration of a magistrate's ruling. When Ms. Dunkin's attorney argued that the attorney fee provision of Local Rule 602C was beyond the scope of authority granted by 28 U.S.C. § 636, Judge Nottingham indicated that Fed. R. Civ. P. 37 was an alternative basis for assessing attorney fees in this situation, and ordered the defendants to file their applications for attorney fees and costs against Ms. Dunkin's attorney by December 8, 1992.

On December 10, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees and costs and announced his order awarding attorney fees and costs of $1,870.93 against Ms. Dunkin's attorney; requiring Ms. Dunkin's attorney to pay this amount to the defendants on or before December 16, 1992; and denying Ms. Dunkin's attorney's request for a stay of execution on the award of attorney fees and costs pending appeal. Throughout Judge Nottingham's December 3, 1992 and December 10, 1992 orders, Ms. Dunkin's attorney was attacked, reprimanded and vilified in the harshest conceivable terms.

On December 15, 1992, Ms. Dunkin filed her motion for Judge Nottingham to recuse himself from the case pursuant to 28 U.S.C. § 455(a), arguing that "what is apparent from a review of the record in this case is that while no legal or factual basis existed for imposing

sanctions against the plaintiff and plaintiff's attorney, Judge Nottingham nevertheless did so over plaintiff's objections, while refusing to impose sanctions against the defendants and defendants' attorney for refusing to obey Judge Nottingham's previous orders to produce all of the documents requested by the plaintiff, and refusing to permit the plaintiff to take the depositions of witnesses with knowledge relevant to the case"; that "as the result of this situation, the plaintiff has been deprived of her right to pursue her lawsuit (including her right to defend against defendants' promised summary judgment motion) in accordance with the intent of Congress in passing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991"; that "Judge Nottingham has exceeded his jurisdiction and abused his power and discretion, in violation of Article III and the due process clause of the Fifth Amendment to the United States Constitution, and the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 1"; and that "it is therefore clear that Judge Nottingham's impartiality might reasonably be questioned in this case." Ms. Dunkin's motion for Judge Nottingham to recuse himself from the case, which was stayed by Judge Nottingham pending resolution of the motion, is still pending before Judge Nottingham.

On December 16, 1992, Ms. Dunkin and her attorney filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit with respect to Judge Nottingham's December 3, 1992 and December 10, 1992 orders.

On December 31, 1992, the defendants filed their motion to dismiss and for sanctions, and their supporting memorandum brief, requesting the court of appeals to dismiss the December 16, 1992 appeal filed by Ms. Dunkin and her attorney, and requesting the court of appeals to impose sanctions against Ms. Dunkin and her attorney for filing a frivolous appeal.

On January 5, 1993, the court of appeals ordered Ms. Dunkin to respond to defendants' December 31, 1992 motion to dismiss and for sanctions within ten days.

On January 12, 1993, Ms. Dunkin and her attorney filed their response to defendants' December 31, 1992 motion to dismiss and for sanctions, their request for oral argument, and their suggestion for hearing en banc.

On February 11, 1993, a hearing panel of the court of appeals composed of circuit judges Moore, Tacha, and Baldock entered its unpublished order dismissing, without oral argument, the appeals filed by Ms. Dunkin and her attorney, and imposing additional sanctions

against Ms. Dunkin's attorney for filing alleged frivolous appeals. The hearing panel remanded the case to Judge Nottingham for a determination of reasonable attorney fees for each defendant for defending the appeals.

On February 25, 1993, Ms. Dunkin and her attorney filed their petition for rehearing and suggestion for rehearing en banc.

On March 17, 1993, the hearing panel that rendered the February 11, 1993 decision denied the petition for rehearing filed by Ms. Dunkin and her attorney. Further, their suggestion for rehearing en banc was denied by the court of appeals.

ARGUMENT

In its (February 11, 1993) unpublished order, the hearing panel of the court of appeals discussed its decision to dismiss, without oral argument, the appeals filed by Ms. Dunkin and her attorney, as follows:

> The law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment. "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). Nor are the orders appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

In the Singleton case cited by the hearing panel, the court of appeals said:

> Despite their general agreement on the interlocutory nature of a sanction order against counsel of record, the circuit courts are sharply divided on the question of whether such an order is immediately appealable as an exception to the "final decision" rule under the collateral order doctrine first announced in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). [Footnote omitted.] "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Coopers Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)(emphasis added). . . .
>
> Since Cohen, the Supreme Court has attempted to define when an order is "effectively unreviewable on appeal from a final judgment." In United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971), the Court indicated an appeal of a collateral order is permissible only when the "denial of immediate review would render impossible any review whatsoever of an individual's claims. . . ." And in United States v. MacDonald, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552-53, 56 L.Ed.2d 18 (1978), the Supreme Court described the third requirement of Cohen as involving "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial. . . ."

Id. at 827-28. The court of appeals then held that an order sanctioning counsel currently of record is not effectively unreviewable on appeal from a final judgment, and that such an order is therefore not immediately appealable under the Cohen collateral order exception to the final judgment rule. Id. at 829.

In the present case, Judge Nottingham has entered orders imposing sanctions totalling $6,412.18 against Ms. Dunkin's attorney,

and requiring Ms. Dunkin's attorney to pay the sanctions imposed against him to the defendants within a few days after entry of the orders. Under these circumstances, Judge Nottingham's orders conclusively determined the disputed question of sanctions, and resolved this important issue completely separate from the merits of the action. If Ms. Dunkin ultimately prevails on the merits, or if the case is settled, Ms. Dunkin's attorney might never be able to receive any appellate review of Judge Nottingham's orders if he is denied that opportunity now. Judge Nottingham's orders are therefore effectively unreviewable on appeal from a final judgment, and are clearly immediately appealable under the Cohen collateral order exception to the final judgment. By holding otherwise in the present case, the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court.

The court of appeals has also rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter. See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985)(leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to conclusion of sanctions matters

as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989)(fee award against counsel appealable), cert. denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order");

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order).

The court of appeals has also so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision, and has decided an important question of federal law which has not been, but should be, settled by this Court.

In its (February 11, 1993) unpublished order, the hearing panel of the court of appeals discussed its decision to impose additional sanctions against Ms. Dunkin's attorney for filing alleged frivolous appeals, as follows:

> The defendants seek the imposition of sanctions pursuant to 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5. The plaintiff and her counsel have filed responses to the requests. See Braley v. Campbell, 832 F.2d 1504, 1514-1515 (10th Cir. 1987).
>
> Under Fed. R. App. P. 38 "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous when "the result is obvious, or the appellant's arguments of error are wholly without merit." Braley v. Campbell, 832 F.2d at 1510 (citations omitted).
>
> Sanctions are appropriate in this case. Counsel for the plaintiff not only pursued appeal no. 92-1230 after he was informed by this court of a jurisdictional defect but also filed another appeal with the identical defect. As noted above, the law is clear and well settled in this circuit regarding the appealability of these orders.

. . .

> These appeals are DISMISSED and the cases REMANDED for a determination of reasonable attorney fees for each defendant for defending these appeals. Those fees shall be imposed against counsel for plaintiff, but not plaintiff. See Braley v. Campbell, 832 F.2d at 1512-1513.

In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990), this Court established the following standard to be applied in reviewing all aspects of a district court's Rule 11 determination:

> [A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

Presumably, the same abuse-of-discretion standard would be applied by this Court in reviewing all aspects of an appellate court's determination of attorney sanctions under 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5.

Under 10th Cir. R. 46.5, an appeal warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law is not frivolous.

In the present case, the hearing panel imposed additional sanctions against Ms. Dunkin's attorney for filing alleged frivolous appeals, and remanded the case to Judge Nottingham for a determination

of reasonable attorney fees for each defendant for defending the appeals. These actions were taken even though the appeals were warranted by this Court's decision in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and by a good faith argument for the extension, modification, or reversal of the court of appeal's decision in G.J.B. & Assoc. v. Singleton, 913 F.2d 824 (10th Cir. 1990).

Under the foregoing circumstances, the hearing panel based its ruling that the appeals filed by Ms. Dunkin and her attorney were frivolous on an erroneous view of the law and on a clearly erroneous assessment of the evidence, and the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court. The court of appeals has also so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision, and has decided an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

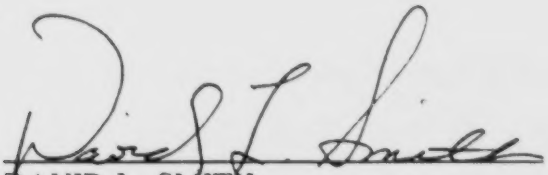
By holding that an order sanctioning counsel currently of record is not effectively unreviewable on appeal from a final judgment, and that such an order is therefore not immediately appealable under the Cohen

collateral order exception to the final judgment rule, the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court. The court of appeals has also rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter; has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision; and has decided an important question of federal law which has not been, but should be, settled by this Court.

By imposing additional sanctions against Ms. Dunkin's attorney for filing alleged frivolous appeals, even though the appeals were warranted by existing law and by a good faith argument for the extension, modification, or reversal of existing law, the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court. The court of appeals has also so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision, and has decided an important question of federal law which has not been, but should be, settled by this Court.

Ms. Dunkin and her attorney therefore request this Court to grant their petition for a writ of certiorari to the court of appeals.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONER